

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7196 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 - Yes, 3 to 5 - No

KETAN HARKISHAN MARVADI

Versus

SAURASHTRA - KUTCH STOCK EXCHANGE LTD.

Appearance:

MR JAYANT P BHATT for Petitioners

MR HARIN P RAVAL for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 21/09/1999

ORAL JUDGEMENT

Petitioner No. 2 M/s Marwadi Shares & Finance Pvt. Ltd. is a member of Saurashtra-Kutch Stock Exchange Ltd.- respondent No. 1 herein. Petitioner No. 1 is the Managing Director of petitioner No. 2 Company. For the sake of convenience, petitioner No. 2 is hereinafter referred to as "the petitioner".

The respondent-Stock Exchange is holding

elections for the offices of the members of the governing council of the respondent Stock Exchange. The petitioner filed his nomination form for the said elections. The form was rejected on the ground that the petitioner is not eligible to contest such elections as the petitioner has not completed three years membership with the respondent Stock Exchange, as required by Rule 74(2) of the Articles of Association. The petitioner has, therefore, filed the present petition for a writ of mandamus or any other appropriate writ to direct the Stock Exchange to file the requisite Form No. 23 with amended Articles of Association of the respondent Company with deletion of Article 74(2). In substance, the petitioner has challenged Article 74(2) read with Article 74(1) of the Articles of Association which read as under :-

"ARTICLE 74 : NON-ELIGIBILITY OF MEMBERS OF THE COUNCIL.

74 (1) IN CASE OF INDIVIDUAL MEMBERS :

No member shall be eligible to be elected as a member of the Council of Management if -

(i) xxx xxx xxx xxx

(ii) he/she has been a member for less than three years standing on the last day for submission of proposals by candidates for election.

(iii) to (vii) xxx xxx xxx xxx

(2) IN CASE OF CORPORATE MEMBERS :

In case of a Corporate Member, one of its whole time directors subject to the fulfillment of the following conditions in addition to the above mentioned conditions for individual members would be eligible to be elected as a member of the Council of Management.

(i) to (iii) xxx xxx xxx xxx

(emphasis supplied)

2. Mr SN Soparkar, learned counsel for the petitioners has urged the following contentions :-

- (i) The only disqualifications which can be imposed by the Articles of Association of any public limited Company for holding the office of a Director are those contained in Section 274 (1) of the Companies Act, 1956 (hereinafter referred to as "the Companies Act") and none of those disqualifications provides that a person cannot become a Director without completing three years membership of the concerned Company.
- (ii) Sub-section (3) of Section 274 empowers only a private Company to provide that a person shall be disqualified for appointment as a director on any grounds in addition to those specified in sub-section (1) of Section 274. By necessary implication, therefore, a public limited Company is prohibited from providing for any additional disqualification. Strong reliance is placed on the decision of the Bombay High Court in Cricket Club of India Ltd. vs. Madhav L. Apte, (1975) 45 Company Cases 574.

3. On the other hand, Mr Harin Raval, learned counsel appearing on caveat for respondent No. 1-Stock Exchange has opposed the petition and has submitted that the respondent Stock Exchange is not an ordinary public limited Company but it is governed by the provisions of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as "the Securities Act") which is a special enactment to prevent undesirable transactions in securities by regulating the business of dealing therein, by prohibiting options and by providing for certain other matters connected therewith; and that there is an all pervasive control of the Central Government in the matter of formation of the Stock Exchange, the constitution of the governing body of such Stock Exchange and various other matters detailed in the provisions of the Securities Act. Hence, the principle on the basis of which the Bombay High Court rendered its decision in the case of Cricket Club of India (Supra) is not applicable in the instant case.

It is submitted that the Securities Act itself enables the Stock Exchange as well as empowers the Central Government to impose many other conditions for ensuring proper governance of the Stock Exchange and none of those provisions are contemplated by the Companies Act or Section 274 thereof. Reference is made to the definition of Rules in Section 2(g), provisions of Section 3, Section 4 relating to recognized Stock Exchanges and Sections 7A and 8 of the Securities Act.

4. In rejoinder, Mr Soparkar has submitted that none of the provisions of the Securities Act override the provisions of Section 274 of the Companies Act and that wherever the Parliament intended to give overriding effect to any of the provisions of the Securities Act over the provisions of the Companies Act, specific provision is made to give such overriding effect to Section 7A and Section 8 of the Securities Act, but the question of additional qualifications necessary for being eligible for becoming a member of the governing council of the Stock Exchange is not a matter which falls within the provisions of Section 7A or Section 8 of the Securities Act.

5. Having heard the learned counsel for the parties, this Court is of the view that even assuming that the aforesaid view of the Bombay High Court in Cricket Club of India Ltd. case is correct and on that basis it were to be held that a public limited Company would not be in a position to prescribe any additional disqualifications other than those provided in sub-section (1) of Section 274 of the Companies Act, the said principle will not apply in case of the Stock Exchanges governed by the Securities Act for the reasons stated hereafter.

6. Mr Soparkar's argument runs thus:-

Please read the provisions of Section 274 of the Companies Act on their own. So read, in light of the judgment of the Bombay High Court in the case of Cricket Club of India (Supra), a public limited Company is prohibited from imposing additional disqualifications for appointment of directors. There is nothing in the provisions of the Securities Act which overrides the above prohibition and, therefore, the relevant portion of Article 74 of the respondent Stock Exchange is illegal, in so far as it imposes the additional disqualification against a member with less than three years membership of the stock exchange.

7. If the premise of Mr Soparkar that the provisions of Section 274 of the Companies Act have to be read by themselves without recourse to the provisions of the Securities Act were correct, the answer may be that no public limited company has power to provide for any additional disqualifications other than those contained in Section 274(1) of the Companies Act, but this Court is of the view that the correct question to be formulated would be -

"Is a Stock Exchange governed by the provisions of the Securities Act, which is incorporated as a public limited company under the Companies Act, prohibited by Section 274 (3) of the Companies Act from providing any additional disqualifications for holding the office of a Director in the Stock Exchange other than the provisions in Section 274(1) of the Companies Act?".

8. It is true that in Cricket Club of India case (Supra), the Bombay High Court has held that sub-section (3) of Section 274 permitting private limited companies to impose additional disqualifications is required to be construed as a prohibition on public companies and its subsidiaries from imposing additional disqualifications. However, the reasoning which appealed to Court for arriving at such a conclusion was the phraseology of sub-section (3) of Section 274 permitting a private limited company to add additional grounds for disqualifications. By applying the principle of necessary implication, the Bombay High Court read the same as a provision against the public limited company from adding any additional ground of disqualification. Justice SK Desai speaking for the Bombay High Court relied on the observations in Craies on Statute Law (7th Ed.) to the effect that statutory enactments, although expressed in affirmative language, are sometimes treated as having a negative implied and their provisions, though affirmative in words, are not necessarily so, if they are absolute, explicit and peremptory. Even statute limiting anything to be in one form, although it bespoke in the affirmative, yet includes in itself a negative. When there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative. The learned Judge referred to Stroud's Judicial Dictionary and observed that the expression "necessary" means something stronger than "possible" and the implication must be one which is so strong and irresistible that the alternative is not one that would appeal to a rational mind. The learned Judge then referred to observations of Lord Hardwick in a case relating to interpretation of a will and adapted them as under :-

Necessary implication means, not natural necessity, but so strong a probability of intention that an intention to the contrary to that which is imputed to the legislature cannot be supposed.

9. The question would, therefore, be whether the probability of Parliament's intention to prohibit a public limited company from providing for any additional disqualifications as culled out from the phraseology of sub-section (3) of Section 274 of the Companies Act will also apply in the case of a Stock Exchange which is also governed by another set of statutory provisions made by Parliament itself.

10. The relevant provisions of Section 274 of the Companies Act read as under :-

"Sec. 274(1) A person shall not be capable of being appointed director of a company, if -

(a) to (f)

(2)

(3) A private company which is not a subsidiary of a public company may, by its articles, provide that a person shall be disqualified for appointment as a director on any grounds in addition to those specified in sub-section (1).

The relevant provisions of the Securities Act read as under :-

"Sec. 2(g). 'rules' with reference to the rules relating in general to the constitution and management of a stock exchange, includes, in the case of stock exchange which is an incorporated association, its memorandum and articles of association.

Sec. 3. Application for recognition of stock exchanges - (1) Any stock exchange, which is desirous of being recognised for the purposes of this Act, may make an application in the prescribed manner to the Central Government.

(2) Every application under sub-section (1) shall contain such particulars as may be prescribed, and shall be accompanied by a copy of the bye-laws of the stock exchange for the regulation and control of contracts and also a copy of the rules relating in general to the constitution of the stock exchange, and in

particular, to -

- (i) the governing body of such stock exchange, its constitution and powers of management and the manner in which its business is to be transacted;

Section 4 in so far as the same is relevant for the purposes of the present petition reads as under :-

"4. Grant of recognition to stock exchanges

(1) If the Central Government is satisfied, after making such inquiry as may be necessary in this behalf and after obtaining such further information, if any, as it may require -

- (a) that the rules and bye-laws of a stock exchange applying for registration are in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors;

(b) & (c) xxx xxx xxx xxx

- (2) The conditions which the Central Government may prescribe under clause (a) of sub-section (1) for the grant of recognition to the stock exchanges may include, among other matters, conditions in relation to -

- (i) the qualifications for memberships of stock exchanges;

(ii) to (iv) xxx xxx xxx xxx

- (3) Every grant of recognition to a stock exchange under this section shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the stock exchange is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India.

(4) xxx xxx xxx xxx xxx

- (5) No rules of a recognized stock exchange relating to any of the matters specified in sub-section (2) of section 3 shall be amended except with the approval of the Central Government.

Relevant provisions of Section 8 read as under:-

"8. Power of Central Government to direct rules to be made or to make rules - (1) Where, after consultation with the governing bodies of stock exchanges generally or with the governing body of any stock exchange in particular, the Central Government is of opinion that it is necessary or expedient so to do, it may, by order in writing together with a statement of the reasons therefor, direct recognised stock exchanges generally or any recognised stock exchange in particular, as the case may be, to make any rules or to amend any rules already made in respect of all or any of the matters specified in sub-section (2) of section 3 within a period of six months from the date of the order.

(2) xxx xxx xxx xxx xxx

(3) Where in pursuance of this section any rules have been made or amended, the rules so made or amended shall be published in the Gazette of India and also in the Official Gazette or Gazettes of the State or States in which the principal office or offices of the recognised stock exchange or exchanges is or are situate, and, on the publication thereof in the Gazette of India, the rules so made or amended shall, notwithstanding anything to the contrary contained in the Companies Act, 1956, or in any other law for the time being in force, have effect as if they had been made or amended by the recognised stock exchange or stock exchanges, as the case may be."

11. It is thus clear that the Parliament has not treated stock exchanges like any other public limited Companies which are ordinarily governed in such matters exclusively by the provisions of the Companies Act. The Parliament has made special provisions for regulating the formation of the stock exchanges and also for their governance including constitution of the governing body of the stock exchange. If the stock exchange were intended by the Parliament to be treated like any other public limited Company, there was no need for the Parliament to make a special enactment like the Securities Act. As per Section 3(2), the Stock Exchange has to submit Rules [which expression includes articles of association vide section 2(g)] relating, inter alia,

to the constitution of its governing body, such rules can certainly provide the eligibility criteria of three years membership before contesting for the office of a director. Such a qualification can be added by the Central Government as a condition under sub-section (1) of Section 4. The conditions enumerated at Sr.Nos. (i) to (iv) in sub-section (2) of Section 4 are only illustrative and not exhaustive as indicated by the words "amongst other matters" and, therefore, Mr Soparkar's argument that item (i) "the qualifications for memberships of stock exchanges" would not include "the qualifications or disqualifications for the office of a director of stock exchange" does not carry the petitioners' case any further. Moreover, even after formation of the stock exchange, under sub-section (1) of Section 8 the Central Government has the power to direct the stock exchanges generally or a particular stock exchange to make or amend any rule relating, inter alia, to constitution of governing body of the stock exchange. Sub-section (3) of Section 8 gives overriding effect to such rules made or amended under such direction of the Central Government, and the provisions of the Companies Act.

12. It is open to the Central Government to give a direction to amend the "rules" of the stock exchange (which expression includes the Articles of Association) to add such disqualification under Section 8(1) and then the stock exchange would be bound to comply with such direction and on publication of such rule/amended rule in the official gazette, it would have overriding effect over the provisions of the Companies Act (including Section 274 of the Companies Act). In this respect, the Court sees no difference whether the stock exchange itself imposes a disqualification which is approved by the Central Government or whether the Central Government gives a direction and then the stock exchange makes or amends the Articles of Association. The overriding effect given by sub-section (2) of Section 8 is available in either case. In view of the aforesaid statutory provisions, the principle of necessary implication invoked by the Bombay High Court in case of Cricket Club of India Ltd. will not be applicable to stock exchanges governed by the Securities Act, because in that case, the Cricket Club of India Ltd. was an ordinary public limited Company which was not governed by any other special enactment like the Securities Act.

13. Apart from the fact that Article 74 of the Articles of Association as originally made in 1989 contained a similar disqualification and the same was not

disapproved by the Central Government under sub-section (1) of Section 4 of the Act, after the amendment made with the approval of the Central Government in 1997, the amended Article 74 also contains the same disqualification (re : less than three years membership for contesting for the office of a director).

14. Coming to Section 7A, it is true that it does not deal with the qualifications or disqualifications for members of the governing council of the stock exchange. The said provision deals with matters like the voting rights of members. Now the provisions for the voting rights under the Companies Act specifically provide for the number of votes to depend on the number of shares and the right of the member to give proxy in favour of any other person. Any provision to give only one vote to one member of the stock exchange would be in direct conflict with such a provision under the Companies Act. Hence, it was necessary for Parliament to make an express provision in Section 7A of the Securities Act to give the overriding effect to rules of the stock exchange to prevail over the provisions of the Companies Act. As stated above, the provisions of Section 274 by themselves do not contain any express prohibition against the additional disqualifications being provided by a public limited Company. The inference about the prohibition is sought to be drawn from the phraseology of sub-section (3) of Section 274 which permits a private limited Company to provide for additional disqualifications. As already stated above, the principle of necessary implication can be invoked only when there is nothing else to take a contrary view, but as discussed above, since the provisions of the Securities Act make detailed provisions for formation and governance of the stock exchanges, for rules (including Articles of Association) relating to constitution of the governing body of the stock exchange the principle of necessary implication is not available in case of stock exchanges in so far as the controversy at hand is concerned.

In view of the above discussion, the contention of Mr Soparkar, based on Section 7A of the Act, being oblivious of the aforesaid vital aspect of the Scheme of the Securities Act, must be negatived.

15. Once the power to provide for additional disqualifications is held to be available to the stock exchange, it is not the case of the petitioners that such an additional qualification or disqualification is unreasonable or violative of the provisions of Article 14 of the Constitution. The provisions under challenge lay

down that a member cannot contest for election to the office of the member of the governing council of the stock exchange, unless he has completed three years as a member of the stock exchange. The provision does not appear to be unreasonable or arbitrary nor is any such challenge levelled against the provision.

16. In view of the above discussion, there is no substance in the petition. The petition is, therefore, summarily dismissed.

Sd/-

September 21, 1999 (M. S. Shah, J.)

sundar/-